

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**BOARD OF ZONING ADJUSTMENT**



REVISED DECISION AND ORDER

Application No. 13398, of Francis S. Murphy, pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Paragraph 3101.41 to use the first floor of the subject premises as a day nursery consisting of twelve children in an R-2 District at the premises 3938 McKinley Street, N.W., (Square 1747, Lot 50).

HEARING DATE: December 17, 1980

DECISION DATES: January 7, February 4 and March 4, 1981

FINDINGS OF FACT:

1. The subject property is located in an R-2 District on the south side of McKinley Street between Belt Road and 41st Street, N.W.

2. The subject property is fifty feet wide, and 129 feet deep. It has an area of 6,450 square feet.

3. The subject property is improved with a two story detached dwelling.

4. The application seeks Board approval of an operating child day-care center on the subject premises. Such a center is considered to be a pre-school or kindergarten under the requirements of the Zoning Regulations.

5. The facility is known as The Shoe, and is operated by Mrs. Judith Heintz.

6. Mrs. Heintz is a tenant on the property with a nineteen month lease from the owner. She resides on the subject property, and has so resided for approximately three years. Mrs. Heintz' four children also reside on the property.

7. Mrs. Heintz began caring for one neighbor's child after school on an informal basis. Other children were gradually added, until she now cares for twelve children in addition to her own. Mrs. Heintz was not aware that she needed a Certificate of Occupancy for her use of the premises, until she was so advised by a District Zoning Inspector. Upon being so advised, Mrs. Heintz instituted

proceedings that ultimately led to the filing of the subject application.

8. The proposed school would use a portion of the first floor of the subject premises. The dining room has been converted to a play room. The children also use the living room and a bathroom on the first floor. The kitchen is used to prepare snacks for the children. No portion of the second floor is to be devoted to the school. The second floor, as well as the first floor, is used as the operator's residence.

9. The children also use the large concrete porch, at the front of the house, and the rear yard for outdoor play space. The rear yard is enclosed by a six foot high stockade fence.

10. The maximum number of children to be accommodated in the school would be twelve, in addition to the four children of Mrs. Heintz. The school basically operates after public school hours, from 3 p.m. to 6:30 p.m. There are also three children on the premises for approximately one hour before school, and two children arrive at noon after a half-day of school.

11. The children range in age from six to nine.

12. The children arrive at the school on foot or by school bus. They are picked up by their parents, some of whom walk and some of whom drive. The departures from the school are staggered between 5:00 p.m. and 6:30 p.m. There are usually only one or two parents at the school at any one time picking up children.

13. The school has no articles of commerce for sale.

14. The rear yard of the premises contains approximately 2,800 square feet, enough to provide more than 100 square feet of play area for each child, as required by Sub-paragraph 3101.41 (d) of the Regulations. Most of the time, the children play in the back yard. The children also play on the large front porch and, from time to time, some use the nearby public playground. In the winter months, the children play and watch television inside the house when darkness comes. When the children play in the back yard of the subject property, they laugh, shout and quarrel.

15. The subject property is located in the middle of an area zoned R-2, developed almost exclusively with detached and semi-detached single family dwellings. The R-2 District, as set forth in Sub-section 3102.1 of the Regulations, "consists of those areas which have been developed with one-family semi-detached dwellings and is designed to protect them from invasion by denser types of

residential development. It is expected that they will continue to contain some small one-family detached dwellings."

16. The school uses the facilities of the Chevy Chase Playground, located across 41st Street to the west, for additional recreational needs. The children also use the facilities of the Chevy Chase Community Center at Connecticut Avenue and McKinley Street, two blocks to the east.

17. Of the twelve children presently enrolled at the school, seven reside within ten blocks of the site.

18. There have been no physical changes made to the subject building which preclude it from being used as a dwelling.

19. The only physical evidence of the presence of the school is a small unobtrusive sign located adjacent to the front door.

20. Mrs. Heintz has incorporated her school as "The Shoe Inc." under the laws of the District of Columbia. She pays various kinds of taxes normally imposed on an incorporated business in the District.

21. There is extensive testimony in the record on the need for quality day care services in the District of Columbia. The Board finds that the school is reasonably necessary and convenient to the area in which it is located and which it serves.

22. The Office of Planning and Development, by memorandum dated December 5, 1980 and by testimony at the public hearing, recommended that the application be approved. The OPD was of the view that the center provides a needed service with little or no disturbance to the surrounding properties. The OPD further was of the view that the traffic generated by this facility is negligible.

23. Advisory Neighborhood Commission - 3G, by letter dated December 3, 1980, advised the Board that it supported the application "provided that there emerges no significant neighborhood opposition." The ANC letter did not identify any issues or concerns for the Board to address.

24. There was substantial support for the application, from owners and occupants of some of the surrounding or nearby properties, from persons whose children attend the school, and from teachers and other persons concerned with child care issues. This testimony and evidence demonstrated that the school provides a needed service in the area, is well run and that the school is not objectionable to some of

those persons who reside in the immediate vicinity of the premises.

25. There was opposition to the application from several owners of property in the immediate vicinity of the subject property, both at the public hearing and by letters in the record. Their opposition was based on the intrusion of what they believed to be an inappropriate business use into an area zoned for residential use. By letter and by testimony at the hearing, neighbors objected to the noise generated by the children in attendance at the school.

26. The Board finds that the school as operated, with the total of sixteen children on the premises, has been objectionable to adjoining property because of activities which result in noise and other commotion on and around the property. The Board further finds that the school is likely to continue to be so objectionable in the future if this application were granted. The level of noise and activity resulting from the 12 extra children in attendance on the premises substantially exceeds the level of noise and activity that would normally be associated with a single family dwelling. The Board credits the testimony of a backyard-abutting neighbor, Max Barth (an older, retired person who has lived at 5535 41st Street for forty-one years), that the operation of the school has been objectionable because of noise. There is no evidence in the record demonstrating that conditions with respect to noise and activity would significantly improve in the future.

27. The property is subject to a restrictive covenant, a copy of which is marked as Exhibit No. 76 of the record. The operative portion of the restriction provides that "[a]ll houses upon the premises hereby conveyed shall be built and used for residence purposes exclusively, except stables, carriage houses, sheds, or other outbuildings for use in connection with such residences, and no trade, business, manufacture or sales or nuisance of any kind shall be carried on or permitted upon said premises."

#### CONCLUSIONS OF LAW AND OPINION:

The Board concludes that the applicant is seeking a special exception. In order to be granted such an exception, the applicant must demonstrate that he has complied with all of the requirements of Paragraph 3104.41 of the Zoning Regulations. The Board concludes that the applicant has not demonstrated compliance with all of the requirements of Paragraph 3101.41. Specifically, the applicant has not satisfied Sub-paragraph 3101.41(b) in that the activities conducted and to be conducted have been objectionable and are likely to be objectionable because of the number of students and the noise and other conditions that result. Therefore, the application must be denied.

The Board concludes that the testimony and evidence presented in support of the application demonstrated that the proposed school meets most of the criteria established by the Zoning Regulations. There will be no articles of commerce for sale. There is more than 100 square feet of play area per child. The children of the school come primarily from the neighborhood. The use is reasonably necessary and convenient to the area it serves.

The Board further concludes, however, that the operation of the school has been objectionable and is likely to continue to be objectionable because of the number of students and the noise and activity that results. The subject property is developed with a building intended to be used as a single family dwelling. It is quite common to that neighborhood. If used as a single family dwelling, a normal level of noise and activity would be associated with it. However, when used as a school for the care of a much larger number of children than would ordinarily be associated with a single family dwelling, the noise and activity have increased to an objectionable level. The applicant failed to make any proposal which would reduce the noise to an acceptable level. (Mrs. Heintz had a fence built enclosing the back yard, but the fence did not have any significant effect on the noise generated by the children.) It is undisputed that the children playing in the backyard of the premises make a considerable amount of noise. This is to be expected from a group of children in the six to nine age group. The fact that others within earshot of these children do not consider their noise objectionable does not render Mr. Barth's objection to the noise unreasonable.

In Finding No. 27, the Board has noted the existence of a restrictive covenant applicable to this property. The Board notes that the applicant is before the Board seeking a special exception. In such a case, the Board's jurisdiction is limited to determining whether the application meets the applicable requirements of the Zoning Regulations. Neither the Zoning Act nor the Zoning Regulations requires the Board to determine whether action on a special exception application would or would not be contrary to the provisions of a private restrictive covenant. The Board therefore concludes that the existence of the covenant is immaterial to its decision on this application. Enforcement of the covenant is appropriately within the jurisdiction of the Superior Court of the District of Columbia. The Board's decision is based solely on its determination that the applicant failed to satisfy Sub-paragraph 3101.41(b) of the Zoning Regulations.


In consideration of all of the above findings and conclusions, it is therefore hereby ORDERED that the application is DENIED.

VOTE: 4-0 (John G. Parsons, William F. McIntosh and  
Douglas J. Patton to DENY; Charles R. Norris to  
DENY by PROXY; Connie Fortune ABSTAINED).

Following the Remand of the Record to the Board by the D.C.  
Court of Appeals, this order was adopted by a vote of 4-0  
(Connie Fortune, William F. McIntosh, Douglas J. Patton and  
Charles R. Norris to ADOPT the order and DENY, John G.  
Parsons ABSTAINED)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:                     

  
STEVEN E. SHER  
Executive Director

FINAL DATE OF ORDER: 17 DEC 1981

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS "NO  
DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN  
DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL  
RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING  
ADJUSTMENT."